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Sallings v. State Appellant's Brief Dckt. 44421

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TONY CURTIS SALLINGS,)	
)	NO. 44421
Petitioner-Appellant,)	
)	BONNEVILLE COUNTY NO.
v.)	CV 2015-3087
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

HONORABLE DANE H. WATKINS JR
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Tony Sallings contends the district court erred when it summarily dismissed his petition for post-conviction relief, as he had alleged a genuine issue of material fact regarding his trial counsel's failure to impeach the credibility of the confidential informant (*hereinafter*, CI). Specifically, he alleged the CI, whose testimony was critical to the State's case, should have been impeached regarding information that she had stolen some of Mr. Sallings' property after the alleged drug deal in this case, and trial counsel had won the right to address that issue in his cross-examination of the CI in a ruling *in limine*. He also alleged that, had trial counsel done so, the jury would not have convicted him. Therefore, this Court should reverse the order summarily dismissing Mr. Sallings' petition and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

Mr. Sallings filed a petition for post-conviction relief following his conviction at trial for delivery of a controlled substance, methamphetamine. (R., pp.61-64.) He alleged, *inter alia*, that his trial counsel's performance had been objectively deficient because trial counsel had not impeached the CI's credibility with information that she had stolen some of his property despite a ruling *in limine* which permitted him to do so. (See, e.g., R., p.9 ("He did not ask any questions pertaining to the CI stealing my belongings which the court allowed him to do.")¹; accord. R., pp.28, 58, 63, 77.) He also alleged several issues related to the CI's credibility, including that she had been allowed to search parts

¹ To the extent possible, spelling and other grammatical mistakes have been corrected when quoting Mr. Sallings' *pro se* filings.

of her clothing herself as a part of the pre-deal search, and that the officers had all lost sight of her car during part of the alleged deal. (See, e.g., R., pp.35-36, 78.) As a result, he alleged trial counsel's deficient performance in not impeaching the CI's credibility with the stolen property information was prejudicial because, had trial counsel done so, the jury would not have convicted him. (R., pp.59-60, 79.)

The district court appointed post-conviction counsel, who framed that issue this way:

This evidence and the act of theft is appropriate impeachment of this witness on her truthfulness. The District Court ruled that counsel could inquire on that issue however, he failed to do so at trial. It was ineffective assistance of counsel on his part not to inquire into that area. It would obviously go to the truthfulness of [the CI] and her motive to potentially fabricate her testimony, so that Mr. Sallings would be incarcerated and she would have access to his property.

(R., p.126.)

The State moved for summary dismissal of the petition, and in that motion, invited the district court to take judicial notice of the underlying criminal file. (R., p.147.) The district court implicitly did so, as, during the hearing on the State's motion for summary dismissal, it reviewed the transcript of the jury trial proceedings.² (See, e.g., Tr., p.5, Ls.7-11, p.9, Ls.3-5.) In reviewing the ruling *in limine* on whether defense counsel would be allowed to impeach the CI's credibility with the stolen property information, the post-conviction court concluded: "the Court made its ruling related to

² Since the district court implicitly took judicial notice of the documents and transcripts in the underlying criminal record, a motion for this Court to take judicial notice of those same documents has been filed contemporaneously with this brief. References to the documents and transcripts from the underlying criminal file will be identified as "Supp."

that, and Defense Counsel adhered to the Court's ruling." (Tr., p.8, Ls.22-23.)

Specifically, the trial court had held:

But at least in this moment in time for the parties to rely on the Court's thinking I understand what the allegation is and the dates that involve the allegations, there are Rules [of Evidence] -- 608 particularly b that is involved in this analysis and then of course we have 401, 402 and 403 all giving the Court consideration and how they apply to the one other.

I'm comfortable in denying the request [to impeach the CI] under the Rules for the purpose of motive, which would fall under 404 as another wrong act. However, based upon the way this has been presented to the Court, I am comfortable, at this stage, allowing the defense to cross-examine the witness regarding the manner and questions relating to the witness's possession of the property. I think it does, in the Court's mind, relate to truthfulness and untruthfulness.

As I then go back to 403 as to whether it should be excluded . . . I think that protects the parties as to the limits that the Court would place under 608(b) which is that there are no specifics allowed. However, on cross-examination, the Court will allow that to be inquired into and then once, as [the prosecutor] suggested, once that response is elicited then the defense would have to move onto the next question.

(Supp. Tr., p.96, L.8 - p.97, L.9.) No further clarification of that ruling was sought or provided. (See *generally* Supp. Tr.) Defense counsel did not ask the CI any questions about the stolen property during cross-examination. (See *generally* Supp. Tr., pp.179-95.)

Because it concluded trial counsel's inaction had been due to the trial court's ruling *in limine*, the post-conviction court found no deficient performance in trial counsel's failure to impeach the CI with the stolen property information. (Tr., p.8, Ls.22-23, p.9, Ls.3-10.) It also concluded Mr. Sallings had failed to allege prejudice arising from counsel's failure to cross-examine the CI about the stolen property. (Tr., p.9, L. 11 - p.10, L.1.)

Finding no genuine issues of material fact in Mr. Sallings' petition for post-conviction relief overall, the district court granted the State's motion for summary

dismissal. (Tr., p.11, Ls.14-19; R., p.164.) Mr. Sallings subsequently filed a notice of appeal, which was filed premature to the final judgment. (R., pp.159-60, 166.)

ISSUE

Whether the district court erred when it summarily dismissed Mr. Sallings' petition for post-conviction relief.

ARGUMENT

The District Court Erred When It Summarily Dismissed Mr. Sallings' Petition For Post-Conviction Relief

A. Standard Of Review

Post-conviction cases are civil in nature. *Baldwin v. State*, 145 Idaho 148, 153 (2008). In post-conviction cases, a petition may be summarily dismissed only if it does not present a genuine issue of material fact. *Id.*; see I.C. § 19-4906(b). In determining whether a genuine issue of material fact exists, “[a] court is required to accept the petitioner’s un rebutted allegations as true” *Baldwin*, 145 Idaho at 153; *Saykhamchone v. State*, 127 Idaho 319, 321 (1995). Additionally, during the summary judgment phase, the courts “liberally construe the facts and reasonable inferences in favor of the non-moving party,” in this case, Mr. Sallings. *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008); *accord. Charboneau v. State*, 140 Idaho 789, 792 (2004) (“[I]nferences [are] liberally construed in favor of the petitioner.”). When a genuine issue of material fact exists and would, if resolved in the petitioner’s favor, entitle the petitioner for relief, the district court must conduct an evidentiary hearing. *Baldwin*, 145 Idaho at 153; *Berg v. State*, 131 Idaho 517, 518 (1998).

To show a genuine issue of material fact in regard to a claim of ineffective assistance of counsel, the petitioner must allege facts which demonstrate that counsel’s performance fell below a reasonable standard and that the petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth v. State*, 140 Idaho 847, 850 (2004). In regard to the second prong of the *Strickland* test, a petitioner shows prejudice when he demonstrates that there is a reasonable probability that the outcome would have been different, or, in other words,

he must undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *McKay v. State*, 148 Idaho 567, 570 (2010).

B. Mr. Sallings' Allegations Established A Genuine Issue Of Material Fact In Regard To His Trial Counsel's Failure To Impeach The Credibility Of The CI With The Stolen Property Information

Mr. Sallings alleged his trial counsel had been ineffective because he had not impeached the CI's credibility with the information that she had stolen some of his property after the alleged drug deal. (See, e.g., R., pp.77, 126.) The post-conviction court held there was no genuine issue of material fact in that regard for two reasons: (1) there was no deficient performance because "the Court made its ruling related to that, and Defense Counsel adhered to the Court's ruling" (Tr., p.8, Ls.22-23); and (2) Mr. Sallings had failed to allege prejudice resulting from that error. (Tr., p.9, L. 11 - p.10, L.1.) The district court's conclusions in both regards are erroneous, as both are disproved by the record.

1. Mr. Sallings' Sufficiently Alleged Trial Counsel's Performance Was Objectively Deficient

First, the post-conviction court's conclusion – that trial counsel adhered to the trial court's ruling on the impeachment evidence – is clearly erroneous. See, e.g., *Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003) (reaffirming that the appellate court will set aside factual findings of the district court when they are not supported by substantial, competent evidence). The trial transcript clearly shows that the trial court authorized trial counsel to engage in that line of cross-examination and that he failed to do so. As a result, the post-conviction court's conclusion that Mr. Sallings had failed to show deficient performance on that basis is erroneous.

Specifically, the trial transcript shows that, while the trial court decided counsel could not get into the stolen property information as evidence of motive under I.R.E. 404(b), it expressly stated, “on cross examination the Court *will allow* that to be inquired into,” pursuant to I.R.E. 608(b) because that information was relevant to the CI’s truthfulness. (Supp. Tr., p.96, L.12 - p.97, L.9 (emphasis added).) Despite that express authorization to cross-examine the CI on that topic, trial counsel did not ask the CI any questions about the stolen property. (See *generally* Supp. Tr., pp.179-95.) Therefore, the post-conviction court’s conclusion – that trial counsel had simply adhered to the trial court’s ruling – is clearly erroneous and should be disregarded.

Given the trial court’s actual ruling *in limine*, Mr. Sallings raised a genuine issue of material fact under the first prong of the *Strickland* test by alleging “trial counsel did not ask any questions pertaining to the CI stealing my belongings which the courts allowed him to do.” (R., p.9; *accord.*, e.g., R., p.126.) Trial counsel’s failure to impeach a witness constitutes deficient performance when that failure results from inadequate preparation, ignorance of the relevant law, or other objective shortcomings. See, e.g., *Bias v. State*, 159 Idaho 696, 705 (Ct. App. 2015). In *Bias*, for example, the post-conviction record included an affidavit from trial counsel in which he explained he had not impeached the witness in the manner alleged by the petitioner because trial counsel lacked a factual basis for doing so, and the petitioner had presented no evidence contradicting that assertion. *Id.* at 705. Thus, in that circumstance, the record showed no deficient performance. *Id.*

Unlike in *Bias*, there was no indication that Mr. Sallings’ trial counsel had a legitimate tactical reason for not impeaching the CI with the stolen property information.

That is particularly evident from the fact that trial counsel not only fought for, *but actually won*, the right to present that evidence in the ruling *in limine*. Furthermore, Mr. Sallings actually identified the factual basis for that line of questioning, as he alleged the prosecutor was aware of several people who could testify to the relevant facts. (R., p.28; see *also* Supp. R., p.76 (the State's motion *in limine* identifying those people).) Therefore, the reasonable inference is that trial counsel was aware of those persons, and thus, the factual basis for impeaching the CI on the stolen property information. As such, the record shows trial counsel's deficient performance was not a tactical decision, but rather, was the result of ignoring the law of the case as it was set forth in the ruling *in limine*, or of other objective shortcomings. That means Mr. Sallings' allegations established a genuine issue of material fact under the first prong of the *Strickland* test on this claim.

2. Mr. Sallings Sufficiently Alleged Prejudice Resulting From Trial Counsel's Deficient Performance

The post-conviction court's second reason for summarily dismissing this claim – that Mr. Sallings failed to allege prejudice resulting from the alleged deficient performance (Tr., p.9, L.11 - p.10, L.1) – is similarly disproved by the record. Mr. Sallings expressly alleged prejudice arising from trial counsel's deficient performance in this regard by alleging that, had trial counsel impeached the CI's credibility with the stolen property information, the jury would not have returned a guilty verdict. (See R., pp.59-60, 79; see *also* R., p.126 (post-conviction counsel noting the case should proceed to an evidentiary hearing for "a determination by the Court as to the impact such testimony could have had on the jury verdict").) To that point,

Mr. Sallings alleged various facts which show that the CI's testimony, and thus, her credibility, were critical to the verdict rendered.

This case began when the CI called Mr. Sallings to try to set up a controlled drug buy. (See Trial Exhibit 2 (recording of the phone call).) Officers testified that a man subsequently approached the CI's car and got in. (Supp. Tr., p.128, Ls.8-9.) The CI then drove to a different parking lot across the street, and while the officers could still see the car, they could not see what specifically was happening inside the car. (See Supp. Tr., p.129, Ls.16-18, p.210, L.11 - p.211, L.11, p.231, Ls.16-25.) However, that is where the CI testified Mr. Sallings placed the baggie of drugs on the center console, and she gave him cash. (Supp. Tr., p.173, L.23 - p.174, L.5; see *a/so* Trial Exhibit 3 (recording from a wire the CI was wearing).) The CI then drove to a third location, behind a strip mall catty-corner to the second parking lot. (See Trial Exhibit 14 (map of the area in question marked by witnesses during their testimony).) The officers lost sight of the car behind the strip mall. (See Supp. Tr., p.131, Ls.4-9, p.211, Ls.15-20, p.233, Ls.2-5.) There, she let Mr. Sallings out of her car before driving to a different location for debriefing. (Supp. Tr., p.174, L.9 - p.175, L.5.)

Mr. Sallings alleged, as there had been no female officer present, Officer Godfrey's pre-deal search of the CI had included having the CI do a cursory self-search of parts of her clothing, such as her bra and waistband areas. (See, *e.g.*, R., pp.12, 22-23, 35-36.) He also alleged Officer Godfrey had not verified that cursory self-search via a drug dog sniff. (See, *e.g.*, R., p.36.) The trial transcript bears out Mr. Sallings' allegations. Officer Godfrey testified that, while he had checked the CI's pant legs and coat pockets, he had the CI "kind of shake [her bra] out to make sure she wasn't

concealing anything. And then run her thumbs around her waistband and kind of shake her pants out.” (Supp. Tr., p.118, Ls.12-18.) He also admitted that, while he assumed the CI had a purse, she had not brought it out of the car with her when talking to him, it was possible she had left it in the car, and he had not searched a purse before the alleged deal. (Supp. Tr., p.148, Ls.17-23, p.159, L.21 - p.160, L.10; see *generally* Supp. Tr. (including no testimony regarding whether the CI’s purse was actually searched pre-deal).) Mr. Sallings also alleged the drugs found were in a little baggie roughly the size of a postage stamp, and which weighed only 0.93 grams including the bag itself. (R., p.36; Supp. Tr., p.155, Ls.10-18; see *a/so* Supp. R., Trial Exhibit 1 (picture of the baggie).) Based on these facts, Mr. Sallings was alleging the CI could have concealed the drugs from the officers before the deal, and thus, framed him. (See R., p.36.)

That allegation is important because Mr. Sallings also alleged that all three officers lost sight of the CI’s car during the course of the alleged deal, specifically, when it went behind the strip mall. (R., p.19.) Again, that allegation is supported by the record. (Supp. Tr., p.131, Ls.19-23, p.211, Ls.15-20, p.233, Ls.2-5 (each of the officers testifying that he lost sight of the car at that time).) That is important since the CI let Mr. Sallings out of the car behind that strip mall. (Supp. Tr., p.174, Ls.8-20.) Therefore, the facts as alleged by Mr. Sallings and borne out by the record reveal that, not only was the CI the only witness who could actually tie Mr. Sallings to the drugs, but also that she had the opportunity, when no one else could see her, to plant the drugs in her car. What that means in the post-conviction context is that the facts alleged by Mr. Sallings, which were not refuted by the State, show a reasonable possibility that, had trial

counsel impeached the CI's credibility with the information about the stolen property, the jury would have found her testimony not credible, that it was a story made up to cover her attempt to frame Mr. Sallings, and so, gain access to his property. (See R., p.127.) Therefore, not only did Mr. Sallings expressly allege prejudice on this claim, his allegations established a genuine issue of material fact under the second prong of the *Strickland* analysis.

Since the facts alleged by Mr. Sallings show genuine issues of material fact on both the deficient performance and prejudice prongs of the *Strickland* analysis in regard to his claim of ineffective assistance of trial counsel for failing to impeach the CI's credibility with the stolen property information, the district court erred by summarily dismissing his petition for post-conviction relief.

CONCLUSION

Mr. Sallings respectfully requests this Court reverse the order summarily dismissing his petition for post-conviction relief and remand this case for further proceedings.

DATED this 24th day of January, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of January, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
E-MAILED BRIEF

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